STATE OF MICHIGAN

COURT OF APPEALS

LENAWEE COUNTY,

Plaintiff-Appellant,

v

ROBERT D. GARDNER, MICHELE A. GARDNER, and UNITED BANK AND TRUST,

Defendants-Appellees,

and

SKY BANK,

Defendant.

UNPUBLISHED
June 26, 2014

No. 313802
Lenawee Circuit Court
LC No. 05-001961-CC

Before: O`CONNELL, P.J., and FITZGERALD and MARKEY, JJ.

PER CURIAM.

In this condemnation action, plaintiff appeals by right the judgment of $590,000 in compensation, plus interest and fees, entered following a jury determination of a taking and destruction of the value of the real property owned by defendants, Robert D. Gardner, Michele A. Gardner, and United Bank & Trust, which occurred following the imposition of an avigation easement. We affirm in part, reverse in part, and remand.

Plaintiff initially contends the trial court violated the law of the case doctrine by permitting defendants to present evidence and testimony pertaining to FAA regulations involving residential land use in runway protection zones (RPZs). We review de novo whether the trial court followed this Court's prior order on remand and whether the law of the case doctrine applies. *Augustine v Allstate Ins Co*, 292 Mich App 408, 424; 807 NW2d 77 (2011).

As explained by this Court in the companion case of *Lenawee Co v Wagley*, 301 Mich App 134, 149-150; 836 NW2d 193 (2013) *(Wagley III)* (citations and quotation marks omitted):

> The law of the case doctrine holds that a ruling by an appellate court on a particular issue binds the appellate court and all lower tribunals with respect to that issue. [I]f an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case

> where the facts remain materially the same. The doctrine is applicable only to issues actually decided, either implicitly or explicitly, in the prior appeal. The primary purpose of the doctrine is to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit.

In *Wagley III*, the Court rejected "as legally and factually unsound [plaintiff's] argument that the trial court permitted the Wagleys to introduce evidence contravening the law of the case." *Id.* at 155. The Court, following a review of the rulings in *Lenawee Co v Wagley*, unpublished opinion per curiam of the Court of Appeals, issued March 22, 2007 (Docket Nos. 268819, 268820, 268821, 268822, 268823) *(Wagley I)* and *Co of Lenawee v Wagley*, unpublished opinion per curiam of the Court of Appeals, issued December 20, 2011 (Docket Nos. 302533, 302534, 302535, 302537, 302538) *(Wagley II)*, determined that the earlier opinions

> barred (1) evidence predicated on an assumption that FAA regulations required a total taking or precluded homes in the RPZ and (2) evidence contravening the parties' stipulation excluding "testimony" from the FAA. This Court's opinions did not bar all reference to the FAA or exclude the admission or use of FAA regulations. [*Wagley III*, 301 Mich App at 150.]

The Court noted that "both sides used FAA documents to suit their own purposes," and "quarreled about whether the FAA recommended to airport planners that homes be moved outside the RPZ, despite that the FAA permitted their presence." *Id.* at 151, 152. The Court further opined, *id.* at 152-153, quoting *Wagley I*, unpub op at 4, citing MCL 213.54(1):

> [T]he testimony illustrate[s] that it would have been impractical for the parties to have tried this case in an FAA vacuum, without reference to any of the regulations, recommendations, circulars, and statements governing runways and RPZs. Although this Court's ruling in *Wagley I* prohibited the Wagleys from asserting a legally incorrect argument—that the FAA mandated a total taking of their property—our opinion did not address evidence regarding the practicability of removing homes or the dangers attendant to home occupancy in an RPZ. To the contrary, this Court specifically envisioned that "whether the practical value or utility of the remainder of the parcel of property is in fact destroyed is a question to be determined by the finder of fact and included in the verdict."

The question of safety and its impact on the use of defendants' property was acknowledged as comprising a factual issue for determination at trial and, therefore, outside the purview of the law-of-the-case doctrine. As a result, the Court stated that

> "after this Court's earlier opinion, the five cases should have come down to having a jury determine just compensation based on a diminution of value as caused by a property being encumbered by an avigation easement, with the jury still having the ability to determine that a total taking effectively occurred as caused by an easement, *but not based on FAA regulations*." [*Wagley III*, 301 Mich App at 154-155, quoting *Wagley II*, unpub op at 13.]

Plaintiff seeks to expand the actual rulings of this Court, which did not prohibit all references to FAA regulations but rather just the erroneous conclusion that FAA regulations precluded the maintenance of residences within RPZs and, thereby, necessitating a total taking as a matter of law. The issue of the safety of defendants' home following imposition of the avigation easement is not governed by the law of the case doctrine because it was specifically recognized by this Court to comprise an issue of fact subject to proofs. As a consequence of this Court's ruling, the mere fact that the FAA approved the easement did not require an assumption that a total taking could not or did not occur. Akin to being two sides of the same coin, just as defendants were prohibited from asserting that FAA regulations mandated a taking, plaintiff cannot contend that FAA approval of the easement or consistency with FAA regulations automatically eliminated the possibility of a total taking.

In addition, it is disingenuous of plaintiff to complain of the introduction and exploration of evidence and testimony pertaining to the FAA regulations and the relationship between a RPZ and safety, when plaintiff introduced much of this evidence itself. Plaintiff presented Stephanie Ward as a witness and had her qualified as an expert at trial. Plaintiff questioned Ward regarding the effect of the runway expansion project on safety. Ward testified regarding the location of defendants' home in connection with the RPZ and the FAA requirement for angles of descent in landing, the restrictions on height for flights over defendants' home and the safety risk associated with a RPZ. It was Ward who initially introduced scatter diagrams to indicate safe areas for airports. "It is settled that error requiring reversal may only be predicated on the trial court's actions and not upon alleged error to which the aggrieved party contributed by plan or negligence." *Lewis v LeGrow*, 258 Mich App 175, 210; 670 NW2d 675 (2003).

Plaintiff further contends that defendants improperly elicited testimony from Ward, James Searle and Carl Byers suggesting that the location of defendant's home constituted a problem as an incompatible land use and that FAA regulations required that a home must be taken unless it is impracticable to do so. Plaintiff does not contest the accuracy of the legal premise regarding the FAA, merely the elicitation of testimony and evidence about it.

Ward was cross-examined on the opinion expressed within her report that defendants' home constituted an "incompatible use." Byers and Searles concurred with this opinion premised on safety concerns. This Court, in all of the earlier and companion cases pertaining to defendants and the Wagley homeowners, did not prohibit all references to the FAA or its regulations. Rather, the restriction imposed was specific and narrow and dealt only with the assertion that FAA regulations mandated a complete taking of a residence if it was within a RPZ. Given that the subject matter of this litigation involved airport construction or modification, it would be impossible to restrict all references to the FAA or its regulations. Although this Court's ruling precluded any reference to FAA regulations mandating removal of residences from RPZs, it did not encompass evidence regarding the impracticability of the removal of residences from the RPZ or that imposition of the avigation easement presented a sufficient detriment or risk to defendants to require a total taking for purposes of determining just compensation. *Wagley II*, unpub op at 11-13; *Wagley III*, 301 Mich App at 152-153. The earlier rulings by this Court did not preclude evidence regarding impracticability, but rather served to restrict arguments asserting that a determination of impracticability was affirmatively required for a residence to remain in a RPZ. The focus of all the testimony that plaintiff complains about was on the effect of the easement and airport expansion on the safety of defendants, pilots and

others located in the vicinity. FAA regulations were an ancillary and background matter to provide context for the opinions, but not the basis for the opinions expressed.

Plaintiff complains also that valuation testimony elicited violated the law of the case because it was premised on a mandatory taking. This contention is contrary to the actual evidence. David Burgoyne testified before the jury regarding his method of valuation. He discussed in detail the easement restrictions and their impact on the use and enjoyment of the property. He determined that the placement of the home in the RPZ was inappropriate based on the creation of a hazard to the airport and aircraft, in addition to the creation of nuisances and hazards to residents on the ground. At no point did Burgoyne attribute his determination of the destruction of the practical utility and value of the property to FAA regulations. Rather, he provided different valuations premised on separate scenarios, including: (a) continued occupation of the residence, (b) a taking of the entire property, and (c) the value of the property without a residence or as a vacant lot. Contrary to plaintiff's assertion, Burgoyne did not suggest or imply that FAA regulations mandated a taking of the property; rather, he premised his opinion on safety and environmental concerns as a result of the imposition of the avigation easement.

Further, plaintiff mischaracterizes testimony elicited as suggesting defendants asserted lack of FAA approval of the easement. Chamberlain was questioned regarding his failure to consult or review various documents in the development of his valuation opinion. The questions did not imply or suggest a lack of FAA approval, but rather plaintiff's role in electing to place homes within a RPZ. This was, in part, a means employed by defense counsel to question Chamberlain's opinion regarding the effect of the easement and his denial of safety concerns regarding the location of the home. Similarly, any reference or questioning of Searle regarding the placement of the home in the RPZ did not extend to FAA approval but rather was in the context of land use compatibility. The exchange immediately preceding the challenged Burgoyne testimony shows he acknowledged the FAA's approval of the final environmental assessment. The inquiries posed by defense counsel serve to dispute plaintiff's position that the FAA's determination of the area designated for the RPZ supersedes decisions by plaintiff pertaining to the configuration of the airport runways or the permissible size of planes using the airport in the imposition of an avigation easement or the location of residences in the RPZ.

Plaintiff further contends that *Wagley III* was wrongfully decided and failed to properly comprehend and apply the previous rulings contained in *Wagley I* and *Wagley II*. To contend error with regard to the findings in *Wagley III* in this litigation is not the proper forum or method to dispute this Court's ruling in that separate case. Plaintiff's application for leave to appeal that decision to our Supreme Court was denied. *Lenawee Co v Wagley*, 495 Mich 900 (2013). "A published opinion of the Court of Appeals has precedential effect under the rule of stare decisis." MCR 7.215(C)(2). Moreover, this Court must follow the rule of law established in *Wagley III* until it is "reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals." MCR 7.215(J)(1). Further, nothing suggests that *Wagley III* was erroneously decided. As noted, following remand in *Wagley II*, issues specifically subject to litigation encompassed the determination of "just compensation based on a diminution of value as caused by a property being encumbered by an avigation easement" and the ability of a jury "to determine that a total taking effectively occurred as caused by an easement, but not based on FAA regulations." *Wagley II*, unpub op at 13. The evidence and testimony adduced in this trial was consistent with this directive as they encompassed disputes pertaining to the safety of the residence premised on

the easement imposed, proximity to the runway and commensurate location within a RPZ, but did not suggest any preclusion premised on FAA guidelines.

Plaintiff next contends the trial court violated the law-of-the-case doctrine by failing to restrict Burgoyne's valuation testimony to the value premised on continued occupation of the home. In addition, plaintiff asserts Burgoyne's testimony violated MCL 213.61 and MCL 339.2609 based on a failure to submit a written appraisal or exchange appraisals.

In general, an issue must have been raised before, addressed, and decided by the trial court to be deemed preserved for appellate review. *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 443; 695 NW2d 84 (2005). To preserve a challenge to the admission of evidence for appellate review, a party is required to object in the trial court on the same basis as is asserted on appeal. MRE 103(a)(1); *Klapp v United Ins Group Agency, Inc (On Remand)*, 259 Mich App 467, 475; 674 NW2d 736 (2003). Plaintiff engaged in voir dire of Burgoyne before he testified in the presence of the jury, objecting to Burgoyne being permitted to testify regarding his opinion on the value of the property under a full taking situation and contending that only the continued use value should be permitted. The trial court rejected plaintiff's argument. This aspect of the issue is therefore preserved for appellate review. Plaintiff did not, however, object on the basis of MCL 339.2609, failing to preserve this part its claim for appellate review. Claims of preserved evidentiary error are reviewed for an abuse of discretion, *Wagley III*, 301 Mich App at 161-162; while issues of statutory interpretation are reviewed de novo, *In re Temple Marital Trust*, 278 Mich App 122, 128; 748 NW2d 265 (2008). "The trial court abuses its discretion when it chooses an outcome outside the range of reasonable and principled outcomes." *Id.*

In *Wagley II*, this Court precluded the "admission of Burgoyne's appraisal that was *predicated on the assumption that FAA regulations prohibit residential use*." *Wagley II*, unpub op at 10 (emphasis added). This ruling must be placed in context of the additional ruling in that opinion, which permitted the jury to "determine just compensation based on a diminution of value as caused by a property being encumbered by an avigation easement" and further recognizing the "ability" of the jury "to determine that a total taking effectively occurred as caused by an easement, but not based on FAA regulations." *Id.* at 13.

Burgoyne discussed three possible valuations of the property: (a) $225,000 with continued occupancy of the residence, (b) $590,000 representing a total taking value, and (c) $30,000 as a vacant lot with lake access. All of the valuation opinions expressed were premised on his independent personal and professional judgment as an appraiser, and using comparable properties. In arriving at these valuations, Burgoyne assiduously avoided reference to FAA mandates or regulations, but rather indicated safety concerns and restrictions imposed by the easement as affecting valuation and continued residential use. Although he opined that the easement and location of the home in the RPZ "resulted in the destruction of the practical utility and value of the remainder of the residence," and necessitated a total taking, he acknowledged that defendants continued to reside in the home.

This testimony fails to demonstrate a violation of the law of the case doctrine, which "holds that a ruling by an appellate court on a particular issue binds the appellate court and all lower tribunals with respect to that issue." *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001). As discussed in *Wagley III*, 301 Mich App at 149-150, the doctrine applies

only to issues actually decided, either implicitly or explicitly, in the prior appeal. "The primary purpose of the doctrine is to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit." *Ashker*, 245 Mich App at 13. Because Burgoyne never stated that his opinion was premised on a mandatory taking in accordance with FAA regulations, his testimony was not precluded by the law of the case doctrine.

Plaintiff further asserts Burgoyne's testimony violated MCL 213.61 because his "appraisal . . . was neither written nor exchanged." Although it is difficult to discern, it appears that plaintiff is seeking to preclude a portion of Burgoyne's appraisal by mischaracterizing it as a separate document, when the appraisal itself indicates "this report is actually three appraisals." Contrary to plaintiff's assertion, Burgoyne's December 16, 2009 written appraisal includes all three valuation amounts as Burgoyne testified to at trial. But excluded from the appraisal report submitted to the jury and Burgoyne's testimony was any reference that his opinion was premised on the assumption "that residential use after the taking is improper based upon FAA regulations that prohibit residences within the Runway Protection Zone." This preclusion was consistent with *Wagley II* and one which plaintiff demanded.

The trial court's decision that Burgoyne "essentially gave one appraisal on this property" is consistent with the evidence. Plaintiff fails to explicate his argument or how Burgoyne's testimony violates the cited statutory provision. "It is not enough for an appellant to simply announce a position or assert an error in his or her brief and then leave it up to this Court to discover and rationalize the basis for the claims, or unravel and elaborate the appellant's arguments, and then search for authority either to sustain or reject the appellant's position." *DeGeorge v Warheit*, 276 Mich App 587, 594-595; 741 NW2d 384 (2007). Based on plaintiff's failure to adequately develop its argument and cite legal authority in support of its contentions, we find this aspect of the issue is abandoned. *Id.*

Plaintiff also contends that Burgoyne's testimony violates MCL 339.2609. Plaintiff's only contention is that MCL 339.2609 requires "[a]n appraisal shall be in writing," and asserts that the appraisal "was neither written nor exchanged. . . ." Yet, once again, we observe that plaintiff provided a written copy of the appraisal as an exhibit to its appellate brief, belying any suggestion that a written appraisal was not produced. As with the other assertion of statutory violation under this issue, based on plaintiff's failure to fully explain its position, this allegation of error is deemed abandoned. *DeGeorge*, 276 Mich App at 594-595

For its third argument on appeal, plaintiff presents a rather confusing statement, implying that the trial court erred in permitting the jury to determine damages in excess of the rights actually taken by the imposition of the avigation easement, contrary to established law and the law of the case doctrine. Using convoluted and circular logic, plaintiff asserts that because the composition and size of a RPZ is a designation solely made by the FAA, it does not equate to the taking of any rights and that plaintiff cannot be responsible for damages that are the result of the actions of a different governmental agency through imposition of a RPZ.

Although, during trial, plaintiff elicited testimony or otherwise suggest that the FAA was responsible for the determination of whether a property came within the RPZ, plaintiff did not specifically raise or preserve an issue pertaining to the exclusive jurisdiction of the FAA, rendering the issue unpreserved for appellate review. This Court reviews a trial court's factual

findings for clear error and its application of law de novo. *Schroeder v Detroit*, 221 Mich App 364, 366; 561 NW2d 497 (1997). Jurisdictional issues are also reviewed de novo. *Pontiac Food Ctr v Dep't of Community Health*, 282 Mich App 331, 335; 766 NW2d 42 (2008). This Court reviews unpreserved issues for plain error affecting substantial rights. *In re Smith Trust*, 274 Mich App 283, 285; 731 NW2d 810 (2007).

Plaintiff contends that it cannot be held liable for damages that are solely the result of FAA regulations defining the dimensions of the RPZ. The damages determined by the jury were not premised on the placement of defendants' property in the RPZ, but rather on the imposition of the easement and whether it resulted in a "taking," based on the instructions provided by the trial court and the verdict form completed by the jury, which plaintiff approved. To the extent that plaintiff implies the trial court lacked jurisdiction, we note that plaintiff initiated this action in the circuit court under the auspices of state law. In accordance with the Uniform Condemnation Procedures Act (UCPA), MCL 213.51 *et seq.*, and specifically MCL 213.55, a governmental agency is required to tender a good-faith offer to acquire private property before initiating litigation. "[T]he tendering of a good-faith offer is a necessary condition precedent to invoking the jurisdiction of the circuit court in a condemnation action." *In re Acquisition of Land for the Central Indus Park Project*, 177 Mich App 11, 17; 441 NW2d 27 (1989). This Court confirmed that plaintiff met this necessary pre-condition. *Wagley I*, unpub op at 3. Because plaintiff initiated this action in the state circuit court and sought a determination of just compensation, it cannot now assert that it is not a proper party for the imposition of damages. Plaintiff, is bound by its pleadings, *Joy Oil Co v Fruehauf Trailer Co*, 319 Mich 277, 280; 29 NW2d 691 (1947), and is not permitted to litigate issues or claims that were not raised in its complaint, *Belobradich v Sarnsethsiri*, 131 Mich App 241, 246; 346 NW2d 83 (1983).

Plaintiff also implies error in permitting the jury to determine damages based on a total taking rather than on merely a diminution in value due to the imposition of the easement. First, plaintiff indicated concurrence with the trial court's instructions to the jury and the jury verdict form. "It is settled that error requiring reversal may only be predicated on the trial court's actions and not upon alleged error to which the aggrieved party contributed by plan or negligence." *Lewis*, 258 Mich App at 210.

Second, plaintiff's contention that damages were restricted solely to diminution in value is inconsistent with the law of the case as the Court in *Wagley II*, specifically indicated:

> In our view, after this Courts' earlier opinion, the five cases should have come down to having a jury determine just compensation based on a diminution of value as caused by a property being encumbered by an avigation easement, *with the jury still having the ability to determine that a total taking effectively occurred as caused by an easement*. . . . [*Wagley II*, unpub op at 13 (emphasis added).]

This possibility was also recognized in *Wagley I*, unpub op at 7.

To suggest that the jury had the ability to determine a "total taking," yet was restricted to an award of damages premised only on a partial taking is nonsensical. As discussed in *Dep't of Transp v Tomkins*, 481 Mich 184, 198; 749 NW2d 716 (2008):

> [A] guiding principle when awarding just compensation in a condemnation suit is to "neither enrich the individual at the expense of the public nor the public at the expense of the individual" but to leave him "in as good a position as if his lands had not been taken." Thus, in a partial taking, the formula to calculate the fair market value of the remainder parcel must account for the fact that damages will vary from case to case, depending on the unique circumstances of each taking. Restoring the individual to his position before the taking will require a flexible, case-by-case approach to damages. [Citation omitted.]

Because under the law of the case doctrine the jury was permitted to determine whether a total taking occurred, combined with plaintiff's concurrence with the jury instructions for determining just compensation, plaintiff's contention that the award lacks justification is without merit.

Plaintiff also alleges the trial judge improperly biased and partial questioning of defense witnesses. Plaintiff further contends the inquiries posed by the trial judge implied to the jury that residential occupancy in the RPZ was prohibited.

To preserve an issue of judicial bias, a party must raise the claim before the trial court. *Mitchell v Mitchell*, 296 Mich App 513, 521; 823 NW2d 153 (2012); MCR 2.003(D). Plaintiff filed a motion, seeking disqualification of the trial judge asserting bias premised on his earlier rulings. The motion was denied by the trial judge and on de novo review. But plaintiff did not object to the trial judge's questioning of Burgoyne. As such, the issue, as presented, is not properly preserved for appellate review. This Court reviews de novo claims asserting judicial bias in the conduct a proceeding deprived a party of his constitutional right to a fair trial. *In re Susser Estate*, 254 Mich App 232, 236; 657 NW2d 147 (2002). Unpreserved issues are reviewed for plain error affecting substantial rights. *In re Smith Trust*, 274 Mich App at 285.

"Due process requires that an unbiased and impartial decision-maker hear and decide a case." *Mitchell*, 296 Mich App at 523. A judge should be disqualified when it is demonstrated that he or she is incapable of impartially hearing a case because of bias for or against a party or when events lead to the appearance of impropriety. MCR 2.003(C)(1)(a) and (b); *Cain v Dep't of Corrections*, 451 Mich 470, 494-496; 548 NW2d 210 (1996). But a party who asserts that a judge is biased or prejudiced must overcome a heavy presumption of judicial impartiality. *Id.* at 497. A party claiming judicial bias must show that the judge "'display[ed] a deep-seated favoritism or antagonism that would make fair judgment impossible.'" *Eldred v Ziny*, 246 Mich App 142, 152; 631 NW2d 748 (2001), quoting *Cain*, 451 Mich at 496.

In this instance, the trial judge engaged in extremely brief and limited questioning of one witness while counsel had paused to locate an exhibit. Burgoyne had been testifying regarding the various easement restrictions and his contention that many were vague and undefined. One of the easement restrictions pertaining to limitations of a "congregation" of people had not been specifically addressed by Burgoyne, but had been broached with other witnesses. In initiating his questions, the trial judge stated: "You indicated that there's nothing here to prohibit people living there." The trial judge then queried Burgoyne regarding the existence of a restriction pertaining to a "congregation of people on this property," and asked "how many people constitute[] a congregation." Burgoyne indicated a lack of knowledge regarding the parameters of the restriction, with the trial judge also indicating, "I don't know what it means."

In accordance with MRE 614(b), a trial court has the authority to interrogate witnesses to clarify points and to elicit additional relevant evidence. *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 24; 436 NW2d 70 (1989). In addition, "[a] trial judge has a duty to exercise reasonable control over the interrogation of witnesses and the presentment of the evidence in order to make the interrogation and presentment effective for the ascertainment of the truth." *Id.*, citing MRE 611(a)(1).

The trial judge's questioning of Burgoyne was brief and limited, comprising an area of questioning already addressed with other witnesses that had opined on the specific easement restriction and its meaning. Contrary to plaintiff's contention, the questions raised by the trial judge did not imply a prohibition on residency, but merely served to explore how the easement restrictions affected the use and enjoyment of the land. Further, the trial judge, at the initiation of the colloquy specifically acknowledged "there's nothing here to prohibit people living there," contradicting plaintiff's assertion for bias on appeal. The manner in which the trial judge questioned Burgoyne was not intimidating, argumentative, prejudicial or unfair. The exchange did not demonstrate partiality. Due to the lack of record support, there is no probability that the jury was unduly influenced by the questioning. Consistent with MRE 614(b), the questioning was structured and initiated to elicit full and clear testimony regarding an issue before the jury. See *Murchie v Standard Oil Co*, 355 Mich 550, 559; 94 NW2d 799 (1959).

In addition, plaintiff failed to timely object to the questioning "at the time or at the next available opportunity when the jury is not present." MRE 614(c). Because the questioning at issue was immediately preceding the close of proofs, plaintiff had an opportunity to object but failed to avail itself of it. Moreover, the trial court instructed the jury that "[t]he questions put to witnesses are also not evidence. You should consider these questions only as they give meaning to the answers you heard from witnesses." The trial court also instructed the jury:

> I have not meant to indicate any opinion as to the facts by my rulings, conduct, or remarks during the trial; but if you think I have one, you should disregard it because you're the judges of these facts, not me.

These instructions rendered any potential error harmless. "'Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors.'" *Zaremba Equip, Inc v Harco Nat'l Ins Co*, 302 Mich App 7, 25; 837 NW2d 686 (2013) (citation omitted).

Plaintiff also contends the trial court erred in permitting Franklin McVeigh to testify under MRE 702 and MRE 703, and that the testimony should have been excluded because its probative value was substantially outweighed by the danger of unfair prejudice, MRE 403.

This Court reviews the qualification of a witness as an expert and the admissibility of the testimony of the witness for an abuse of discretion. *Surman v Surman*, 277 Mich App 287, 304-305; 745 NW2d 802 (2007). An abuse of discretion occurs when a circuit court chooses a result that falls outside the range of reasonable and principled outcomes. *Id*. at 305.

"MRE 702 incorporates the standards of reliability that the United States Supreme Court described to interpret the equivalent federal rule of evidence in *Daubert v Merrell Dow Pharm, Inc*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)." *Edry v Adelman*, 486 Mich 634,

639; 786 NW2d 567 (2010). While *Daubert* hearings are required when dealing with expert *scientific* opinions to assure the reliability of the foundation for the opinion, "where non-scientific expert testimony is involved, 'the [*Daubert*] factors may be pertinent,' or 'the relevant reliability concerns may focus upon personal knowledge or experience.'" *Surles ex rel Johnson v Greyhound Lines, Inc*, 474 F3d 288, 295 (CA 6, 2007) (citations omitted). "The gatekeeping inquiry is context-specific and 'must be tied to the factors of a particular case.'" *Id.*, quoting *Kumho Tire Co, Ltd v Carmichael*, 526 US 137, 150; 119 S Ct 1167; 143 L Ed 2d 238 (1999).

Defendants sought to have McVeigh testify "as an expert on real estate brokerage issues, particularly involving disclosure requirements." Plaintiff did not object to McVeigh as an "expert real estate broker," but questioned whether he demonstrated "special expertise in the disclosure issues." The trial court determined McVeigh could serve as an expert in this capacity, "in view of the fact that he's served on these boards for many years related to disclosure issues . . . it would appear that it's part of the job of a real estate broker to analyze this kind of stuff."

McVeigh proceeded to testify as a realtor regarding the impact of the airport and easement on the marketability of defendants' property and the disclosures required in real estate transactions. McVeigh did not offer "scientific" expert testimony; rather, his testimony constituted "other specialized knowledge." MRE 702; *Surles*, 474 F3d at 295. "In this context, the factors enumerated in *Daubert* cannot readily be applied to measure the reliability of such testimony." *Id.*, citing *Kumho Tire*, 526 US at 150.

McVeigh's testimony was limited to the marketability of the property and the necessity for disclosures when attempting to sell defendants' home. At the onset of his testimony, defendants explored in detail McVeigh's employment history, education, experience and professional associations as a realtor to provide a foundation for the opinion rendered. Defendants, through this questioning, established the basis for McVeigh's proffered testimony and expertise and its direct relationship to the facts of the case, which concerned the valuation of property. A review of the lower court record demonstrates that McVeigh sufficiently explained how his experience led to his opinion. It became clear through questioning, that McVeigh's opinion was formulated based on his personal experience and not in reliance on professional literature or studies. It is a trial court's responsibility to perform its role as a gatekeeper, and to protect the jury from unsound and irrelevant testimony. *Tobin v Providence Hosp*, 244 Mich App 626, 650-651; 624 NW2d 548 (2001). While a judge must carefully monitor the proceedings, and, with the aid of objections from counsel, eliminate methodologically unsound or irrelevant expert testimony, "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert*, 509 US at 596.

"While there 'must be facts in evidence to support the opinion testimony of an expert,' circumstantial proof that enables reasonable inferences is sufficient." *Kalaj v Khan*, 295 Mich App 420, 429; 820 NW2d 223 (2012) (citation omitted). Based on the nature of the testimony elicited and the indication that McVeigh's testimony constituted opinion based on his experience, the trial court did not err in admitting his testimony. Plaintiff's concerns relate more to McVeigh's credibility, which is solely for the jury to determine. *Unibar Maintenance Servs, Inc v Saigh*, 283 Mich App 609, 635; 769 NW2d 911 (2009). Further, plaintiff did not

specifically object to the testimony and cannot demonstrate the existence of plain error affecting its substantial rights. *Wolford v Duncan*, 279 Mich App 631, 637; 760 NW2d 253 (2008).

Plaintiff also contends that McVeigh's testimony should have been excluded as being more unfairly prejudicial than probative under MRE 403. The major contention at trial was the value of defendants' property following imposition of the avigation easement. Inherent in the determination of value is the marketability of the property and factors that would impinge on an ability to sell the property and the subsequent effect on the price to be obtained. McVeigh's testimony focused, almost exclusively on concerns regarding the problems that could arise in listing the property and the relevant disclosures that would be mandated. Marketability has previously been recognized as a relevant factor in the valuation of real property. See *Georgetown Place Coop v City of Taylor*, 226 Mich App 33, 48-50; 572 NW2d 232 (1997).

McVeigh's testimony regarding the difficulties inherent in marketing defendants' property given the location and easement restrictions can be construed as damaging to plaintiff's case. But when applying MRE 403, "'unfair prejudice' does not mean 'damaging.'" *Lewis*, 258 Mich App at 199. MRE 403 does not prohibit prejudicial evidence; only evidence that is unfairly so. Evidence is unfairly prejudicial when there is a danger that marginally probative evidence will be given undue or preemptive weight by the jury. *Waknin v Chamberlien*, 467 Mich 329, 334 n 3; 653 NW2d 176 (2002).

In this case, the trial court specifically instructed the jury as follows:

> The opinion of a valuation witness is to be weighed by you, but you must form your own intelligent opinion. In weighing the testimony of any witness as to value, you should consider whether the person has accompanied his or her opinion with a frank and complete disclosure of facts and a logical explanation of the person's reasons that will enable you properly to determine the weight to be given to the opinion the witness stated.

As jurors are presumed to follow a trial court's instructions, *Zaremba Equip, Inc*, 302 Mich App at 25, the probability of the jury giving undue weight to McVeigh's testimony is unlikely.

Plaintiff contends the trial court also erred in permitting defendants' witnesses to testify that the easement permitted pilots to fly seven feet above the home. Plaintiff asserts that navigable airspace is defined by the FAA and was not contingent on the easement because the FAA permits pilots to maintain any altitude necessary for landing or takeoff. A trial court's decision regarding the admissibility of testimony is reviewed by this Court for an abuse of discretion. *Wolford*, 279 Mich App at 637.

In the questioning of Ward, plaintiff broached the topic regarding the possible height of aircraft landing and taking off from the airport. When asked to respond to defense counsel's opening statement that planes could fly seven feet above defendants' house, Ward stated: "A prudent pilot would not be flying seven feet above their house, but they could." She further indicated that such behavior could expose a pilot to FAA sanctions. Similarly, plaintiff's witness, Wise, opined that flying under ten feet above defendant's rooftop "would be imprudent," but acknowledged that it was not prohibited by the FAA.

In discussing disclosures for sale of the realty, McVeigh indicated that various diagrams evidencing height elevations (above sea level) placed defendant's chimney at a height of 823 feet, with the elevation of the easement being between 829 to 831 feet, permitting aircraft to "pass within approximately seven feet." Based on evidence delineating the height of defendants' residence and that of the easement, Burgoyne also opined that "the avigation easement provides the airport the right to allow aircraft to fly seven feet above the roof top of the home."

It is disingenuous of plaintiff to contend, after seeking to preclude references to FAA regulations, that testimony or evidence pertaining to the height of the easement over defendants' property is irrelevant because it is the FAA that controls where pilots fly. The focus of contention in this case was whether the avigation easement affected the safety and value of defendants' property due to the frequency and approach of planes landing and taking off at the Lenawee County Airport. In addition, plaintiff's own expert expressed the same opinion, yet on appeal plaintiff suggests it was inappropriate to permit *defendants'* experts to testify on this same matter. Michigan law has, over an extended time period, recognized that a party cannot complain about the admission of evidence when that party "opened the door" to the evidence. *McGraw v Sturgeon*, 29 Mich 426, 428 (1874). See also *Lewis*, 258 Mich App at 201; *Hilgendorf v St John Hosp & Med Ctr Corp*, 245 Mich App 670, 704 n 47; 630 NW2d 356 (2001); *Bishop v St John Hosp*, 140 Mich App 720, 726; 364 NW2d 290 (1984).

The effect of the avigation easement was an issue of fact to be determined by the jury at trial. The respective experts had conflicting opinions and interpretations regarding the ramifications of the easement. Disagreements pertaining to the interpretation of facts by the expert witnesses are relevant to the weight of that testimony and not its admissibility. *Surman*, 277 Mich App at 309-310. Further, plaintiff's contention that the avigation easement is less restrictive than the local zoning height restrictions on buildings and structures comprises a red herring and a dissemblance, given that the zoning ordinances do not permit the routine passing of a large, fuel-laden aircraft over the subject structures. The height of the easement over defendants' residence and the possibility of flights in that space are directly relevant to a determination of the valuation of the property with respect to concerns of safety associated with the imposition of the easement. Based on the uncontroverted documentary evidence detailing the relevant height restrictions and measurements of the easement and defendants' rooftop, there was no basis for the trial court to exclude this testimony.

Plaintiff also contends the trial court erred in failing to grant its motion regarding the applicability and enforcement of the Lenawee County Airport Zoning Ordinance as precluding defendants' claim for damages. Defendants respond that plaintiff has failed to demonstrate the actual enactment of this ordinance or to have pleaded the ordinance until after the trial court had already ruled on the taking issue. Defendants further contest that the language of the ordinance, if deemed to be valid, precludes damages based on plaintiff's initiation of this litigation under a state statute, MCL 259.126, and involving changes to the airport initiated by plaintiff after defendants' residence was in existence.

This Court reviews de novo issues of law, while reviewing the trial court's factual findings for clear error. *DeCosta v Gossage*, 486 Mich 116, 122; 782 NW2d 734 (2010). In addition, this Court reviews de novo a trial court's interpretation and application of relevant statutes. *Kincaid v Cardwell*, 300 Mich App 513, 522; 834 NW2d 122 (2013).

The Lenawee County Airport Zoning Ordinance provides, in pertinent part, as follows:

> The principle objective of this Ordinance is to provide additional safety and protection to the users of the airport and to the people who live and work in its vicinity. [Section 1.02]
>
> * * *
>
> "Airport Hazard" means any structure or tree within the airport hazard area which exceeds the height limitations established by this ordinance or any use of land or other appurtenances thereto within the airport hazard area which interferes with the safe use of the airport by aircraft. [Section 2.03]
>
> * * *
>
> A person or persons who elect to establish any land use within an Airport Protection Zone which is not recommended by this Section shall have no claim or cause of action against the Airport, nor any municipality or governmental agency operating said airport or responsible for the administration of this Ordinance. Any person or persons electing to establish such non-recommended uses following the effective date of this Ordinance shall do so at their individual risk. [Section 3.07(c)]

The trial court denied plaintiff's motion to preclude damages premised on the ordinance based on the failure of plaintiff to raise this issue in its initial pleadings in this or other related litigation, and the contradictory actions of plaintiff in initiating condemnation proceedings rather than asserting the ordinance as an affirmative defense to any lawsuit brought by defendants.

Initially, we note that the parties entered a stipulated order agreeing to preclude all references to the ordinance in this litigation. Although the parties dispute the legitimacy and validity of the ordinance premised on whether it was actually or properly enacted, we note that this aspect of the issue does not require resolution in order to address the issue on appeal.

Plaintiff initiated the condemnation proceeding pursuant to MCL 259.126. As discussed in a slightly different context in *Wagley III*, 301 Mich App at 160 (citation omitted), "A party is bound by [its] pleadings, and it is not permissible to litigate issues or claims that were not raised in the complaint." Plaintiff cannot initiate a complaint for condemnation and ascertainment of damages and then contend that damages are not available premised on a disputed zoning ordinance. Plaintiff cited to the challenged ordinance in its brief opposing defendants' motion to compel a total taking, but only to support its contention that zoning ordinances were as restrictive as the proposed avigation easement and not to preclude damages. From a strategy standpoint, it would seem difficult for plaintiff to allege on one hand that the location of defendants' property in an airport protection zone was a "non-recommended use" while, on the other hand, simultaneously seeking to establish that the safety of that same structure was unaffected by the imposition of an avigation easement at that location. This may explain why plaintiff initially avoided this argument in this litigation and in other actions.

In addition, plaintiff misconstrues or mischaracterizes the purpose and scope of the zoning ordinance and its applicability to the factual circumstances of this case. According to plaintiff, § 1.02 of the ordinance indicates as its "principle objective" the provision of "additional safety and protection" to those using and surrounding the airport and that § 2.03 designates defendants' residence as being within the "airport hazard area." The difficulty for plaintiff's argument is the language within § 3.07(c). Plaintiff elects to focus solely on the term "individual risk." However, this term must be placed in context not only with the language in the subsection but also within the entire ordinance.

The cited provisions are part of a zoning ordinance, which is defined as an "ordinance that regulates the use to which land within various parts of" a governmental unit by allocating "uses to the various districts," and usually "regulates the height of buildings and the proportion of the lot area that must be kept free from buildings." *Black's Law Dictionary* (9th ed). The rules of statutory construction apply equally to the interpretation of municipal ordinances. *Ferguson v City of Lincoln Park*, 264 Mich App 93, 95; 694 NW2d 61 (2004). "This Court's goal in interpreting either statutes or ordinances is to give effect to the intent of the enactors." *Id*. This Court first examines plain language of the ordinance; when the language used in the ordinance is clear and unambiguous, it must be applied as written. *Id*. at 95-96.

The language of the ordinance indicates that persons establishing a "non-recommended use" within an Airport Protection Zone "shall have no claim or cause of action against the Airport, nor any municipality or governmental agency operating said airport or responsible for the administration of this Ordinance." Lenawee County Airport Zoning Ordinance, § 3.07(c). In this instance, defendants have not initiated a cause of action; litigation was initiated by plaintiff. Furthermore, although defendants' construction of their home was after establishment of the airport, it preceded plaintiff's expansion of the airport and its designation for classes of planes able to use the facilities. Thus, defendants did not come to the condition, rather the condition changed at the instigation of plaintiff. When read in the context of other provisions of the ordinance, such as §§ 1.04, 1.05, 1.07, 2.08, 3.02, and 3.03, the language used demonstrates that the ordinance is designed to restrict heights of structures and trees surrounding the airport. In this context, § 3.07(c) is inapplicable to a takings action but rather restricts a landowner from seeking damages for the county's enforcement of the ordinance's height restrictions. Plaintiff's reference to the ordinance in opposing defendants' motion to compel a total taking provides further evidence for a more restricted application of the ordinance than now suggested.

Plaintiff specifically contends that the ordinance was enacted consistent with the Airport Zoning Act, MCL 259.432 *et seq.*, which "pertains to regulation of land use involving areas immediately adjacent to . . . airport property itself . . . ." *Capital Region Airport Auth v Charter Twp of DeWitt*, 236 Mich App 576, 581 n 3; 601 NW2d 141 (1999). The Airport Zoning Act contains MCL 259.462, which specifically contemplates a condemnation action as an alternative to "airport zoning regulations." Specifically, MCL 259.462 states:

> In any case in which: (a) it is desired to remove, lower, or otherwise terminate a non-conforming structure, tree or use; or (b) the approach protection necessary cannot, because of constitutional limitations, be provided by airport zoning regulations under this act; or (c) it appears advisable that the necessary approach protection be provided by acquisition of property rights rather than by

> airport zoning regulations, the commission, on behalf of and in the name of the state, within the limitation of available appropriations, or each political subdivision within which the property or non-conforming use is wholly or partly located or the political subdivision owning, operating, controlling or which is lessee or lessor of the airport or is served by it may acquire, by purchase, grant, or condemnation in the manner provided by the law under which the commission, on behalf of and in the name of the state, or political subdivisions are authorized to acquire real property for public purposes, such air right, avigation easement, or other estate or interest in the property or non-conforming structure or use in question as may be necessary to effectuate the purposes of this act.

Consequently, the act recognizes that a zoning ordinance and condemnation actions are not mutually exclusive but merely different methods or processes to achieve distinct goals.

Plaintiff also contests the trial court's award of interest pursuant to MCL 213.65, premised on defendants continuing to reside at the property and asserting that the November 2007 order pertained only to air rights and did not comprise an actual taking or possession of the property by plaintiff for the imposition of interest.

The right to interest on judgments under the UCPA is purely a statutory creation. *Dep't of Trans v Joslyn Land Co*, 175 Mich App 551, 553; 438 NW2d 260 (1988). Issues of statutory interpretation are reviewed de novo. *Driver v Naini*, 490 Mich 239, 246; 802 NW2d 311 (2011).

The imposition of interest is governed in this matter by MCL 213.65, which provides:

> (1) The court shall award interest on the judgment amount or part of the amount from the date of the filing of the complaint to the date that payment of the amount or part of the amount is tendered. However, if a portion of the judgment is attributable to damages incurred after the date of surrender of possession, the court shall award interest on that portion of the judgment from the date the damage is incurred.
>
> (2) Interest shall be computed at the interest rate applicable to a federal income tax deficiency or penalty. However, an owner remaining in possession after the date that the complaint is filed waives the interest for the period of the possession.
>
> (3) If it is determined that a de facto acquisition occurred at a date earlier than the date of filing the complaint, interest awarded under this section shall be calculated from the earlier date.

The trial court's November 21, 2007, "order for payment of estimated just compensation and surrender of possession," provides in relevant part:

> Whereby title to the property described in the Complaint and Declaration of Taking, has vested in Plaintiff on July 25, 2005, by virtue of its action of filing in this cause its Complaint and Declaration Of Taking on July 25, 2005, and depositing the amount of estimated compensation.

* * *

> IT IS FURTHER ORDERED that physical possession of the property described in the Declaration of Taking shall be surrendered to the Plaintiff as of the date of entry of this Order.

The property described in the declaration of taking is the avigation easement, which imposed certain restrictions on defendants' property and the airspace over it. The judgment entered at the conclusion of trial awards "payment of statutory interest pursuant to MCL 213.65 from November 21, 2007 when possession was granted to Plaintiff on all unpaid just compensation until the date of actual payment." Unlike the Wagleys, it is undisputed in this litigation that defendants have remained in possession and use of the residence during the proceedings. As such, the doctrine of stare decisis does not apply because *Wagley III* is factually distinguishable. See *Yankee Springs Twp v Fox*, 264 Mich App 604, 613 n 1; 692 NW2d 728 (2004).

Addressing this same issue, the *Wagley III* Court found that the November 2007 order served to "immediately and permanently deprive [defendants] 'of any possession or use' of the property actually taken—the airspace above the parcel." *Wagley III*, 301 Mich App at 172. This Court concluded, "The Wagleys' right to interest under the statute also began to run as of the date of their loss of use and right to possess the airspace above the property—November 21, 2007." *Id.* Notably, Judge Kirsten Frank Kelly dissented, solely on this issue, indicating that because the Wagleys "remained in possession of the property [they] therefore waived any statutory interest" in accordance with MCL 213.65 and recommended reversal of the trial court's ruling. *Id.* at 177. Plaintiff, on appeal in the current matter, seeks this Court to find that *Wagley III* was wrongfully decided. We concur and find *Wagley III* factually distinguishable and not binding under the doctrine of stare decisis.

"The cardinal rule of statutory construction is to give effect to the intent of the Legislature." *Dep't of Trans*, 175 Mich App at 553. First, the language of the statute is examined, and if clear and unambiguous, the plain terms of the statute must be applied as written; judicial construction is not permitted. *Driver*, 490 Mich at 247. "'Unless defined in the statute, every word or phrase should be accorded its plain and ordinary meaning, taking into account the context in which the words are used.'" *Tuggle v Dep't of State Police*, 269 Mich App 657, 663, 712 NW2d 750 (2005)(citation omitted).

Interpreting an earlier, but substantially similar, version of MCL 213.65, this Court opined in *Dep't of Transp v Jorissen*, 146 Mich App 207, 213; 379 NW2d 424 (1985):

> Plaintiff's interpretation of the statute is consistent with other provisions of the act. MCL § 213.59(1) . . . provides that after the agency has fulfilled certain requirements the trial court shall fix the time and terms for the surrender of possession of the property to the agency. MCL § 213.59, subds (2), and (3) . . . govern the procedures regarding the granting of interim possession to the agency. The Legislature contemplated that the owner of the property would remain in possession until the trial court ordered surrender of possession or interim possession. Until that time, the owner of the property retains possession of the

property. An agency may not obtain possession absent an order of surrender of possession or interim possession.

In this case, the trial court ordered: "unless an appeal is taken, pursuant to MCL 213.54(1) Plaintiff shall file a notice with the Court indicating whether it *elects to receive title and possession* of the remainder of the parcel within thirty-five (35) days of the entry of this Judgment. . . . If Plaintiff elects to take title, *issues relating to this election and possession* of the Subject Property shall be addressed by further order of the Court." (Emphasis added.) There existed no interim order awarding possession to plaintiff. Because defendants remained in possession of the property, they effectively waived their right to interest on the judgment for that period. MCL 213.65(2).

This Court came to a similar conclusion in *Escanaba & Lake Superior R Co v Keweenaw Land Assoc, Ltd*, 156 Mich App 804, 820-821; 402 NW2d 505 (1986), in applying that portion of MCL 213.65 stating "an owner remaining in possession after the date of filing shall be considered to have waived the interest for the period of possession." The Court opined: "If the UCPA interest statute were applied in the instant case, defendants would receive no interest, since they were never ousted from their property." *Id.* at 821.

Defendants assert that the relevant factor for the imposition of interest is plaintiff's acquisition of the easement, rendering the trial court's ruling correct. Such an interpretation is not consistent with the actual language of provisions of the UCPA. "An easement is an interest in land through which one individual has the right to use the land of another for a specific purpose." *Mumaugh v Diamond Lake Area Cable TV Co*, 183 Mich App 597, 606; 456 NW2d 425 (1990). "Unlike a lease or license, an easement may last forever, but it *does not give the holder the right to possess*, take from, improve, or sell the land." *Black's Law Dictionary* (9th ed) (emphasis added). Thus, an easement is a limited property interest—the right to use the land burdened by it for a specific purpose—but not to occupy or possess the burdened property except as necessary for using the easement. *Dep't of Natural Resources v Carmody-Lahti Real Estate, Inc*, 472 Mich 359, 378; 699 NW2d 272 (2005); *Morrill v Mackman*, 24 Mich 279, 284 (1872).

The scope of the UCPA is defined in MCL 213.52(1) and encompasses "standards for the acquisition of property by an agency, the conduct of condemnation actions, and the determination of just compensation." The UCPA defines the terms "acquire," "take," and "acquisition" as "the transfer of ownership of property to an agency by involuntary expropriation." MCL 213.51(a), (b). Contrary to defendants' argument, the purpose of the UCPA and its relevant interest provision is to address the "transfer of ownership" and not merely the imposition of an easement. As such, the trial court erred in its award of interest from the specified date as transfer of title and ownership to the property had not occurred as evidenced by the wording of the trial court's judgment.

It has also been suggested that the interest provision is applicable because the imposition of the easement was the equivalent of a "de facto taking." Of significance, in accordance with this argument, is the provision of MCL 213.65(3), which states: "If it is determined that a de facto acquisition occurred at a date earlier than the date of filing the complaint, interest awarded under this section shall be calculated from the earlier date." A "de facto taking" is defined as:

> 1. Interference with the use or value or marketability of land in anticipation of condemnation, depriving the owner of reasonable use and thereby triggering the obligation to pay just compensation. 2. A taking in which an entity clothed with eminent-domain power substantially interferes with an owner's use, possession, or enjoyment of property. [*Black's Law Dictionary* (9th ed).]

A de facto taking may occur when the government, without the benefit of condemnation proceedings, directs action toward a property that has the effect of limiting the use and value of the property. *Dorman v Clinton Twp*, 269 Mich App 638, 645; 714 NW2d 350 (2006). A property owner asserting that a "de facto taking" occurred must show that the government's actions were a substantial cause of the decline of the property's value and also show that the government abused its legitimate powers by taking affirmative actions aimed directly at the owner's property. *Hinojosa v Dep't of Natural Resources*, 263 Mich App 537, 548; 688 NW2d 550 (2004). "A taking for purposes of inverse condemnation means that governmental action has *permanently deprived the property owner of any possession or use of the property*." *Marilyn Froling Revocable Living Trust v Bloomfiekd Hills Country Club*, 283 Mich App 264, 294; 769 NW2d 234 (2009)(emphasis added), citing *Charles Murphy MD, PC v Detroit*, 201 Mich App 54, 56; 506 NW2d 5 (1993).

In this case, while evidence existed that imposition of the easement interfered with defendants' use and enjoyment of the property, it did not permanently deprive defendants of any possession or use of their residence. And although the jury determined "that the taking destroyed the practical value or utility of the remainder of the [defendants'] property," this is not the equivalent of a deprivation of possession and use during the pendency of these proceedings, thus rendering unavailing defendants' assertion of entitlement to interest pursuant to MCL 213.65.

Such an outcome is also consistent with the intent and purpose underlying the concept of just compensation. "The purpose of just compensation is to put property owners in as good a position as they would have been had their property not been taken from them. The public must not be enriched at the property owner's expense, but neither should the property owner be enriched at the public's expense." *Dep't of Transp v VanElslander*, 460 Mich 127, 129; 594 NW2d 841 (1999)(citation omitted).

Finally, plaintiff contends the trial court erred in its award of 125 percent of the value of the property to defendants because the residence was not actually taken as required by MCL 213.23(5) and because this statutory provision is not applicable retroactively. The issue as presented in this appeal regarding the award of compensation under MCL 213.23(5) is identical to the issue presented in *Wagley III*. Defendants have conceded that the trial court erred in ruling on this issue premised on the holding of *Wagley III*.

In accordance with MCR 7.215(C)(2), "[a] published opinion of the Court of Appeals has precedential effect under the rule of stare decisis." "The rule of stare decisis generally requires courts to reach the same result when presented with the same or substantially similar issues in another case with different parties." *WA Foote Mem Hosp v City of Jackson*, 262 Mich App 333, 341; 686 NW2d 9 (2004). Moreover, MCR 7.215(J)(1) provides: "A panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the

Supreme Court, or by a special panel of the Court of Appeals as provided in this rule." Consequently, the doctrine of stare decisis and our Court Rules require that we reverse of the trial court's award 125 percent compensation under MCL 213.23(5).

In *Wagley III*, 301 Mich App at 175, the Court noted that with respect to the constitutional right to just compensation when the government takes private property, "MCL 213.23(5) created a new right in achieving this purpose—the right to an enhanced just compensation award that did not exist before. It also imposed a converse duty on the condemning agency to remit an enhanced award." The Court also reasoned it should not give the amendments retroactive effect because "a court may not retroactively apply the statute if this application would abrogate or impair vested rights, create new obligations, or attach new disabilities regarding transactions or considerations that have already occurred." *Wagley III*, 301 Mich App at 176 (citations omitted and reformatted).

In the present case, just as in *Wagley III*, plaintiff filed its complaint to condemn defendants' property on July 25, 2005. The amendments to MCL 213.23, 2006 PA 367 and 2006 PA 368, adding subsection 5, did not become effective until December 23, 2006. Premised on the doctrine of stare decisis, the trial court's award under MCL 213.23(5) requires reversal.

We affirm in part, reverse in part, and remand for further action consistent with this opinion. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey